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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 714

STATE OF ILLINOIS and GLEN D. PALMER,
PETITIONERS

v

UNITED STATES CIVIL SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court's opinion (Pet. App. 36-112) is reported at 191 F. Supp. 495. The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 27-35) is reported at 297 F. 2d 450.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1962. The petition for a writ of

certiorari was filed on February 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the civil remedies of the Hatch Act—which give to the affected State the option of (1) removing the State officer whose political activities violate the Act, or (2) losing an amount of federal funds equal to twice that officer's annual salary—constitute an unconstitutional interference with State prerogatives and, in particular, deny the State a republican form of government.

2. Whether the Hatch Act applies to an officer who controls the policy, personnel, and administration of the Illinois Conservation Department, the activities of at least eight of the nine Divisions of which are financed in part by federal funds.

STATUTE INVOLVED

The pertinent parts of Section 12 of the Hatch Political Activities Act, as added by Section 4 of the Act of July 19, 1940, 54 Stat. 767, 5 U.S.C. 118k, are set forth in the Appendix, *infra*, pp. 12-16.

STATEMENT

Petitioners are the State of Illinois and Mr. Palmer, who was the Director of the Illinois Department of Conservation. They seek review of a decision of the Court of Appeals, reversing the District Court and reinstating the United States Civil Service

Commission's order that Palmer violated Section 12 of the Hatch Act and that his violation warranted his removal from his State office.

The statutory plan. Section 12(a) of the Hatch Act (App., *infra*, p. 12) directs that "no officer or employee" of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal Agency" shall, *inter alia*, "take any active part in political management or in political campaigns." The Act, however, expressly reserves to such persons the right "to vote as they may choose and to express their opinions on all political subjects and candidates."

Section 12(b) (App., *infra*, pp. 13-15) provides for investigations by the Civil Service Commission upon complaint, notice to the allegedly offending person and the State by which he is employed, and a hearing. The Commission is then to "determine whether any violation of [subsection (a)] has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it

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The concluding sentence of Section 12(a) states that "the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices." There is no dispute that these exceptions are inapplicable to this case. See Pet. 5, n. 1, 11.

was committed from his office or employment," with an eighteen-month period of ineligibility for reappointment. The Commission notifies both the individual and the State of its determination. If the individual is not removed within thirty days of such notification, or has been reappointed to any position in a State or local agency in that State within eighteen months of removal, the Commission is to "certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency * * * an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation." Notice of this order is sent to the State or local agency from which such amount is ordered to be withheld.

Section 12(c) (App., *infra*, pp. 15-16) provides that "[a]ny party aggrieved by any determination or order" may seek district court review "of such determination or order." The court reviews the Commission's determination or order on the administrative record. The Commission's findings of fact are "conclusive" if "supported by substantial evidence" and its "determination or order" is to be affirmed if it "is in accordance with law."

The pertinent facts and the Commission's determinations. The facts are not in dispute. Palmer was employed from January 28, 1953, as Director of the Department of Conservation of the State of Illinois, an office filled by appointment of the Governor of Illinois (R. 14, 16, 20, 22). In this position, Palmer had responsibility for administering,

either directly or through subordinates whom he supervised, various programs which were partially financed by federal monetary grants in substantial amounts (R. 46, 48, 62, 111). While he held this position, Palmer took an active part in political management and political campaigns. These activities included his service as Precinct Chairman and as Chairman of the Kendall County Republican Committee throughout his employment with the Department of Conservation. They also included his filing of primary petitions for political office, his solicitation of signatures for such petitions, and his candidacy for an election to political office (R. 14, 20, 23).

Upon the basis of these facts, the Civil Service Commission issued a letter of charges against both petitioners with respect to Palmer's violation of Section 12 of the Hatch Act (R. 13-15). Petitioners defended on the grounds, *inter alia*, that Section 12 of the Hatch Act "is unconstitutional as an invasion of the rights of Sovereign States by forcing the election of such Director, rather than his appointment by the Governor of such State" and that Palmer's principal employment was not connected with federally-supported activities (R. 22).[2]

After a hearing, the Commission, in two orders, found that Section 12 applied to Palmer in that his principal employment was in connection with State activities financed in part by grants from the federal

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[2] Petitioners also raised other defenses before the Commission and the court below, but these points have been abandoned in this Court.

government, that Palmer had violated Section 12 by taking active part in political management and campaigns, and that the violation was of a character warranting his removal from his position as Director of Conservation (R. 95-104, 105-113).

The decisions of the courts below. Petitioners asked the District Court, under Section 12(c) of the Hatch Act (App., *infra*, pp. 15-16), for review of the Civil Service Commission's determinations (R. 1-6). That court reversed the Commission's order (Pet. App. 36-112). In a long opinion, the court recognized that it was bound by this Court's decision in *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, sustaining the constitutionality of the Hatch Act (Pet. App. 102). The court stated, however, that the *Oklahoma* case "leaves open the question of the constitutional rights of the state officer" (Pet. App. 102), and it apparently concluded that the remedies in the Hatch Act violated Palmer's constitutional and "vested legal rights" in his office (Pet. App. 104). The court also held that the part played by federal grants in Palmer's area of responsibility was *de minimis* and therefore should be overlooked (Pet. App. 107-111).

The court of appeals reversed. It noted that the grounds urged by petitioners for the unconstitutionality of Section 12 were similar to those urged in the *Oklahoma* case, and expressly rejected by this Court. The court of appeals also held, on the authority of *United Public Workers* v. *Mitchell*, 330 U.S. 75, that the private interests of Palmer in his employment were not invalidly affected by the Hatch

Act. Finally, the court held that the rule of *de minimis* was inapplicable to this case, agreeing with the Commission that Palmer (Pet. App. 34):

> had administrative supervision of all nine Divisions of the Department of Conservation. At least six of such Divisions conducted activities to which federal contributions had been made. Palmer was responsible for major policy decisions which had to be made at state level. He initially approved the project plan and report for each federal aid project. By state law, he was given specific responsibility for the state development of Federal-Grant-in-Aid projects. His duties in connection with federally financed activities took up at least fifty percent of his time.

ARGUMENT

1. The court below correctly ruled that this case is controlled by *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127. The constitutional issues raised by petitioners were considered and decided in that case; there is no need for reexamination or further review.

In the *Oklahoma* case, the state official, Paris, while a member of the State Highway Commission, was also, for nine months in 1943, chairman of the Oklahoma Democratic State Central Committee. As a member of the Highway Commission, which received over $2,000,000 from a federal agency under the Federal Highway Act, 42 Stat. 212, as amended, 23 U.S.C. (1946 Ed.) 1-117, his "principal employment" was held to be "in connection with an activity financed in whole or in part by loans and grants from

Federal agency." 330 U.S. at 132. His participation in politics during the nine-month period was comparatively modest, because Oklahoma held no general election that year and the State Democratic headquarters were closed part of the time. As an *ex officio* member of a political dinner committee "he advised with the Governor [of the State] concerning the dinner and called the meeting to order and introduced the toastmaster but he was not active in planning or arranging the dinner." 330 U.S. at 132. The Civil Service Commission determined that these facts constituted taking an active part in political management and in political campaigns, and warranted Paris' removal as Highway Commissioner. These determinations were upheld in the District Court, 61 F. Supp. 355 (D. Okla.), and the Court of Appeals (*State of Oklahoma* v. *United States Civil Service Commission*, 153 F. 2d 280 (C.A. 10)).

In this Court the State of Oklahoma assailed these decisions on the following grounds (330 U.S. at 133-134):

> (1) The Hatch Political Activity Act, in so far as it attempts to regulate the internal affairs of a state, is an invasion of the sovereignty of the states in violation of the United States Constitution. It further is invalid as an unlawful delegation of power.
>
> (2) If valid, the Act applies only to "active" participation in political management or political campaigns. Such "active" participation is not shown to be present in this case.
>
> (3) If valid, the Act did not warrant the United States Civil Service Commission in order-

ing the removal of a state officer or, alternatively, the application of a penalty to the State of Oklahoma.

(4) The decisions of the lower courts place an intolerable and unjustified restriction upon the right of an aggrieved person to a complete judicial review under the Hatch Political Activity Act.

This Court rejected all four attacks on the validity of the Hatch Act. The suggestions of invalidity asserted in the court below in the case now here simply repeat the first three grounds of attack presented and rejected by this Court in the *Oklahoma* case.

Specifically, the Court held that "the United States does have power to fix the terms upon which its money allotments to states shall be disbursed" and "the Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case." 330 U.S. at 143. The Court continued (*ibid.*):

> The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid.

And the Court expressly upheld the remedy provision of the Act, under which, if the State fails to remove the offending official, an amount equal to twice his annual salary will be ordered withheld from the State (330 U.S. at 143-144).

Petitioners contend (Pet. 16, 20), however, that the *Oklahoma* decision is not decisive because "Oklahoma did not invoke that provision of the Constitution" that guarantees "to every State in this Union . . . a Republican Form of Government," which is claimed to invalidate Section 12. But the fact is that Oklahoma, in arguing that the Hatch Act "in so far as it attempts to regulate the internal affairs of a state is an invasion of the sovereignty of the states in violation of the United States Constitution" (Petitioners' Br., 1946 Term, No. 84, p. 9), did rely upon, *inter alia*, "Art. 4, § 4 of the United States Constitution, which guarantees to every state in the union a republican form of government." Under Article 4, § 4, Oklahoma argued, "it is the prerogative of a state to create and maintain its offices of government" (*id.* at 13). The *Oklahoma* decision disposed of that argument as well as of the others. See also *Baker* v. *Carr*, Oct. Term 1961, No. 6, decided March 26, 1962, slip op., Part IV.

Nor is there any novelty or merit to petitioners' argument that the Hatch Act is invalid because of its effect on the "form of State governments," in that it may require certain States to forego federal grants (Pet. 17). The State of Illinois has no vested interest in a federal grant; to receive such an award it must meet conditions set by Congress. And these conditions, the Court held in *Oklahoma*, Congress has the power to exact. 330 U.S. at 143. The choice is up to Illinois.

2. Petitioners' subsidiary contention that Palmer's position was not subject to Hatch Act proscriptions,

because his "principal employment" was not "in connection with any activity which is financed in whole or in part" by federal loans or grants (Pet. 22-25), cannot be squared with the admitted facts of this case. Palmer directly supervised nine Divisions of the Department of Conservation and had complete responsibility for policy direction and administration (R. 46, 48, 62). The Civil Service Commission found that eight of these nine Divisions were financed in part with federal funds (R. 111); it based its finding partially upon the testimony of Palmer to that effect (R. 42). On this factual issue, the court of appeals agreed with the Commission (Pet. App. 34) and there is clearly no need for further review by this Court. That the activities were only financed "in part" by federal funds is immaterial, for that is all that the Hatch Act requires. See Section 12(a), App., *infra*, p. 12.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1962.

APPENDIX

Section 12 of the Hatch Political Activities Act, as added by Section 4 of the Act of July 19, 1940, 54 Stat. 767, 5 U.S.C. 118k, provides in pertinent part:

> Sec. 12. (a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices.

(b) If any Federal agency charged with the duty of making any loan or grant of funds of the United States for use in any activity by any officer or employee to whom the provisions of subsection (a) are applicable has reason to believe that any such officer or employee has violated the provisions of such subsection, it shall make a report with respect thereto to the United States Civil Service Commission (hereinafter referred to as the "Commission"). Upon the receipt of any such report, or upon the receipt of any other information which seems to the Commission to warrant an investigation, the Commission shall fix a time and place for a hearing, and shall by registered mail send to the officer or employee charged with the violation and to the State or local agency employing such officer or employee a notice setting forth a summary of the alleged violation and the time and place of such hearing. At such hearing (which shall be not earlier than ten days after the mailing of such notice) either the officer or employee or the State or local agency, or both, may appear with counsel and be heard. After such hearing, the Commission shall determine whether any violation of such subsection has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment, and shall by registered mail notify such officer or employee and the appropriate State or local agency of such determination. If in any case the Commission finds that such officer or employee has not been removed from his office or employment within thirty days after notice of a determination by the Commission that such violation

warrants his removal, or that he has been so removed and has subsequently (within a period of eighteen months) been appointed to any office or employment in any State or local agency in such State, the Commission shall make and certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency to which such notification was given an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation; except that in any case of such a subsequent appointment to a position in another State or local agency which receives loans or grants from any Federal agency, such order shall require the withholding of such amount from such other State or local agency: *Provided*, That in no event shall the Commission require any amount to be withheld from any loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of such amount would jeopardize the payment of the principal or interest on such bonds or notes. Notice of any such order shall be sent by registered mail to the State or local agency from which such amount is ordered to be withheld. The Federal agency to which such order is certified shall, after such order becomes final, withhold such amount in accordance with the terms of such order. Except as provided in subsection (c), of this section, any determination or order of the Commission shall become final upon the expiration of thirty days after the mailing of notice of such determination or order.

(c) Any party aggrieved by any determination or order of the Commission under subsection (b) may, within thirty days after the mailing of notice of such determination or order, institute proceedings for the review thereof by filing a written petition in the district court of the United States for the district in which such officer or employee resides; but the commencement of such proceedings shall not operate as a stay of such determination or order unless (1) it is specifically so ordered by the court, and (2) such officer or employee is suspended from his office or employment during the pendency of such proceedings. A copy of such petition shall forthwith be served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the determination or the order complained of was made. The review by the court shall be on the record entire, including all of the evidence taken on the hearing, and shall extend to questions of fact and questions of law. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceedings and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may direct such additional evidence to be taken before the Commission in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings of fact or its determination or order by reason of the additional evidence so taken and shall file with the court such modified findings, determination, or

order, and any such modified findings of fact, if supported by substantial evidence, shall be conclusive. The court shall affirm the Commission's determination or order, or its modified determination or order, if the court determines that the same is in accordance with law. If the court determines that any such determination or order, or modified determination or order, is not in accordance with law, the court shall remand the proceeding to the Commission with directions either to make such determination or order as the court shall determine to be in accordance with law or to take such further proceedings as, in the opinion of the court, the law requires. The judgment and decree of the court shall be final, subject to review by the appropriate court of appeals as in other cases, and the judgment and decree of such court of appeals shall be final, subject to review by the Supreme Court of the United States on certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., 1934 edition, title 28, secs. 346 and 347). If any provision of this subsection is held to be invalid as applied to any party with respect to any determination or order of the Commission, such determination or order shall thereupon become final and effective as to such party in the same manner as if such provision had not been enacted.